IN THE SUPREME COURT OF FLORIDA

PAUL C. HILDWIN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER 89,658
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HERNANDO COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0267082
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

PAUL C. HILDWIN,)
)
Appellant,)
)
vs.) CASE NUMBER 89,658
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF VRONZETTIE COX WAS COMMITTED FOR PECUNIARY GAIN THUS RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

Appellee argues that this issue has been waived for appellate review by the fact that during closing arguments to the jury defense counsel conceded the existence of this aggravating factor. However, appellee's argument is clearly specious in light of the trial court's initial finding with regard to this factor:

> This aggravator [pecuniary gain] was originally conceded by the defense at the closing arguments and the resentencing proceeding, but **was later contested by the defense in their sentencing memorandum and that the resentence hearing**. **This Court will consider**, for purposes of discussion, **that the Defense does not concede this issue**, based on their memorandum and on their

arguments presented at the subsequent hearing.

(R 468, emphasis added)

Turning to the merits, appellee has not disputed the fact that the evidence concerning this aggravating factor is purely circumstantial, to wit: Appellant was found in possession of items belonging to the victim after the murder and was seen cashing a forged check after the murder. This evidence does not prove that the murder was committed for the purpose of obtaining this property. For this aggravating circumstance to be upheld, the state must prove that the murder was an "integral step in obtaining some sought-after specific gain." Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988). Where the evidence shows that the taking of property occurred after the murder, as an afterthought, the circumstance is not applicable. Clark v. State, 609 So.2d 514 (Fla. 1993); Hill v. State, 549 So.2d 179 (Fla. 1989). In the instant case, the evidence does not exclude the possibility that the taking of this property was merely an afterthought. Thus the state has not carried its burden of proving beyond a reasonable doubt that this aggravating factor applies. As such, it must be stricken.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellee's initial argument on this point somewhat misconstrues appellant's argument. Appellee presumes that the argument is made solely from the standpoint that only one or maybe two aggravating factors are present. However, appellant's argument that the death sentence is disproportionate in the instant case is not dependent upon this Court invalidating any of the aggravating factors. First, even if this Court does not accept the argument that the aggravating factors of under sentence of imprisonment and prior conviction for a violent felony were impermissibly doubled, under the peculiar facts of this case the strength of the two separate aggravating factors is lessened because **in fact** these two factors refer to the same fascet: Appellant's prior crime is the one for which he was on parole at the time the instant crime was committed. Thus, while perhaps technically not constituting a violation of double jeopardy principles, the force of the two separate aggravators is certainly lessened because of this fact. Appellant certainly does not concede a financial gain aggravator has been proven as has been argued previously. Appellant also does not concede that the aggravating factor of heinous atrocious and cruel has been proven beyond a reasonable doubt. However, for purposes of the argument on proportionality Appellant will presume that these factors have been proven.

The mitigating evidence in the instant case was overwhelming and unrebutted. Appellee places emphasis upon the fact that the mental health experts examined Appellant many years after

the crime occurred and thus the import of their reports is somehow lessened. However, this argument ignores the fact that the very reason that Appellant is in the position he is in today is because his original trial counsel was deemed ineffective in failing to properly investigate and present mitigating evidence. Thus, Appellant should not be punished because of the ineffectiveness of prior counsel. Presumably, had counsel been effective and had Appellant examined immediately after his arrest, and the same diagnoses and testimony presented, appellee would have no argument with respect to the forcefulness of such testimony. Additionally, Appellant points out that in Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995) wherein this Court granted Appellant a new penalty phase due to ineffective assistance of counsel during the penalty phase, this Court noted that at the hearing, Appellant presented an abundance of mitigating evidence which trial counsel could have presented at sentencing. Appellant presented two mental health experts. In a footnote, this Court stated:

> We note that the trial court "found the testimony of the mental health experts offered at the 3.850 hearing **most persuasive and convincing**."

Id. at 110, Footnote 8 (emphasis added) It does not appear that the trial court considered this evidence in finally imposing sentence. Rather the trial court seem to focus solely on the evidence presented during the resentencing proceeding. Appellant contends that this glaring inconsistency by the trial court casts doubt upon the validity of the trial courts' ultimate decision.

The trial court's diminution of the import of the mental mitigating factors even though it ostensibly found such evidence to be impressive, again faults appellant for the sins of his, prior ineffective counsel. There certainly is nothing in the record to suggest that the mental health experts who testified would not have come to the same diagnoses and conclusions had they been

immediately retained to examine appellant. To ignore such unrebutted and, according to the trial court's own assessment, "impressive" testimony clearly shows that the sentence imposed by the trial court cannot withstand the close scrutiny that this Court must give. While for purposes of argument the state may have proven several aggravating factors, the strength of such factors pale in comparison to the overwhelming evidence presented in mitigation. Comparing this case to other cases that have come before this Court, the conclusion is inescapable that death is not appropriate herein.

CONCLUSION

Based upon the foregoing reasons and authorities cited herein as well as those in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate his death sentence and remand the cause for either a new penalty phase or for imposition of a life sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0267082
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to, Mr. Paul C. Hildwin, #923196 (A1-P5212S), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 29th day of December, 1997.

_____

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER